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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

A. ROBERT KLEINER, ROSIE BOARD, FRANCIS BROUILLETTE and ERMA LURVEY, Democratic Members of the Michigan Commission on Legislative Appointment

*Appellants*,

v.

RICHARD SANDERSON, CLARE DANIELS, JOHN PAYANT, and LOU ANN TAYLOR, Republican Members of the Michigan Commission on Legislative Appointment

*Appellees*.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

I.

HAS THIS COURT AUTHORIZED A "RANGE OF ALLOWABLE [POPULATION] DIVERGENCE [IN LEGISLATIVE APPORTIONMENT PLANS OF] AT LEAST 16.4%"?

II.

IS THE STRICT STANDARD OF *DE MINIMIS* POPULATION DIVERGENCE FOR *COURT*-ORDERED LEGISLATIVE APPORTIONMENT PLANS, *CHAPMAN* v. *MEIER*, 420 U.S. 1 (1975); *CONNOR* v. *FINCH*, 431 U.S. 407 (1977), INAPPLICABLE TO *STATE* COURTS?

III.

MAY A COURT-ORDERED PLAN OF LEGISLATIVE APPORTIONMENT DISREGARD ALL OTHER FACTORS OF POPULATION INEQUALITY EXCEPT THE DISPARITY BETWEEN THE LARGEST DISTRICT AND THE SMALLEST DISTRICT?

IV.

MAY THE FOLLOWING OF POLITICAL SUBDIVISION BOUNDARIES BE SUBSTITUTED FOR EQUALITY OF POPULATION, AS NEARLY AS PRACTICABLE, AS THE PRIMARY STANDARD FOR LEGISLATIVE APPORTIONMENT?

## LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The parties are as set forth in the caption. Others were permitted limited participation as *amici curiae*.*

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## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF ALL PARTIES TO THE PROCEEDING BELOW | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS | 2 |
| STATEMENT OF THE CASE | 3 |
| THE QUESTIONS PRESENTED ARE SUBSTANTIAL | 5 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Chapman* v. *Meier*, 420 U.S. 1 (1975) | 2, 4, 7, 8, 9 |
| *Connor* v. *Finch*, 431 U.S. 407 (1977) | 4, 8, 9, 10, 11 |
| *Dodge* v. *Austin*, 423 U.S. 886 (1975), *aff'g.* E.D. Mich. No. 4-70235 (1975) | 3 |
| *In Re Apportionment of State Legislature*, 373 Mich. 247, 128 N.W. 2d 721 (1964) | 3 |
| *In Re Apportionment of State Legislature (Badgley* v. *Secretary of State)*, 376 Mich. 410, 137 N.W. 2d 495 (1965) | 3 |
| *In Re Apportionment of State Legislature — 1965-66 (Badgley* v. *Secretary of State)*, 377 Mich. 396, 140 N.W. 2d 436 (1965), *appeal dismissed* 385 U.S. 114 (1966), *reh. den.* 385 U.S. 1021 (1967) | 3 |
| *In Re Apportionment of State Legislature — 1972*, 387 Mich. 442, 197 N.W. 2d 249 (1972) | 3 |
| *In Re Apportionment of State Legislature — 1982*, 413 Mich. 96, ___ N.W.___ 2d (1982) | passim |
| *Karcher* v. *Daggett*, No. 81-2057, probable jurisdiction noted ___ U.S. ___, 50 LW 3998.01 (June 21, 1982) | 11 |
| *Lathrop* v. *Donohue*, 367 U.S. 820 (1961) | 2 |
| *Mahan* v. *Howell*, 410 U.S. 315 (1973) | 4, 6 |
| *Marshall* v. *Hare*, 378 U.S. 561 (1964) | 3, 4, 7 |
| *Maryland Committee* v. *Tawes*, 377 U.S. 656 (1964) | 10 |
| *Reynolds* v. *Sims*, 377 U.S. 533 (1964) | 6, 9, 11 |
| *Wise* v. *Lipscomb*, 437 U.S. 535 (1978) | 9 |

**Constitutional Provisions**

| | |
|---|---|
| Mich. Const., art. IV, §§2-6 | 3, 7 |

**Statutes**

| | |
|---|---|
| 28 U.S.C. §1257(2) | 2 |
| 28 U.S.C. §2403(b) | 2 |

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*Appellants,*

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinions and orders of the Michigan Supreme Court are reported at 413 Mich. 96 (1982), __ N.W.2d ___. They are reprinted in the Appendix hereto.

### JURISDICTION

In an original proceeding to resolve an impasse among the members of the Michigan Commission on Legislative Apportionment, the Michigan Supreme Court on March 25, 1982 *sua*

*sponte* held unconstitutional the legislative appportionment provisions of the Michigan Constitution and directed, in principle, its own plan of legislative apportionment. On May 21, 1982, the Court denied appellants' application for rehearing as to the remedy, and it directed adoption of a specific plan of legislative apportionment. On August 5, 1982, appellants filed in the Michigan Supreme Court a notice of appeal to this Court.

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) with respect to the Michigan Supreme Court's plan of legislative apportionment, which appellants have challenged as repugnant to the equal protection clause of the Fourteenth Amendment. *Chapman* v. *Meier*, 420 U.S. 1, 13-14 (1975); *Lathrop* v. *Donohue*, 367 U.S. 820, 824-825 (1961).*

## CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, §1 United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, §§2-6, of the Michigan Constitution of 1963, is set forth in the Appendix hereto.

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*Pursuant to Rule 28(c), notice is given that 28 U.S.C. §2403(b) may be applicable.

## STATEMENT OF THE CASE

The Michigan Constitution of 1963, Art 4, §§2-6, provides for decennial reapportionment of the Michigan legislature based on weighted land-area/population formulae. It further provides that, following the decennial census, a bipartisan commission on legislative apportionment is to adopt a legislative apportionment plan in accordance with such formulae (§6, ¶[5]). If the commission deadlocks, the Michigan Supreme Court is to select the tendered plan which complies most accurately with "the constitutional requirements." (§6, ¶[7]).

In *Marshall* v. *Hare*, 378 U.S. 561 (1964), this Court found the area-based apportionment standards to be unconstitutional under the Fourteenth Amendment requirements of *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

Thereafter, in 1964 and again in 1972, the legislative apportionment commission *procedures* were followed, but the Michigan Court resolved commission deadlocks by applying strict "one person, one vote" substantive standards. *In Re Apportionment of State Legislature*, 373 Mich. 247 (1964), 128 N.W. 2d 721; *In Re Apportionment of State Legislature (Badgley* v. *Secretary of State)*, 376 Mich. 410 (1965), 137 N.W. 2d 495; *In Re Apportionment of State Legislature — 1965-66 (Badgley* v. *Secretary of State)*, 377 Mich. 396 (1965), 140 N.W. 2d 436, appeal dismissed 385 U.S. 114 (1966), reh. den. 385 U.S. 1021 (1967); *In Re Apportionment of State Legislature — 1972*, 387 Mich. 442 (1972), 197 N.W. 2d 249.

The validity of such legislative apportionment commission and related court procedures was upheld by this Court in *Dodge* v. *Austin*, 423 U.S. 886 (1975), affirming E.D. Mich., No. 4-70235 (1975) (3-judge court).

Nevertheless, when in 1982 the Commission on Legislative Apportionment again reached impasse and its members thereupon submitted to the Michigan Supreme Court competing plans of population-based legislative apportionment, the Court — effectively reversing itself after two decades and five inter-

vening elections — *sua sponte* held that the State constitutional provisions relating to Commission and Court procedures were, after all, unconstitutional because such procedural provisions were not severable from the substantive provisions found invalid in *Marshall* v. *Hare*, *supra*. *In Re Apportionment of State Legislature — 1982*, 413 Mich 96 (March 25, 1982). The Court appointed a master, Bernard J. Apol, to whom it delegated the responsibility of drafting a plan of legislative apportionment, which would become effective unless the Michigan legislature sooner (effectively, within a month) adopted its own plan. In the same opinion and order (March 25, 1982), Apol — *but not the legislature* — was instructed strictly to follow county, city and township boundary lines, up to an "allowable" 16.4% (±8.2%) population deviation. The Court asserted that it derived that population standard from *Mahan* v. *Howell*, 410 U.S. 315 (1973), which it said announced a rule "that the range of allowable [population] divergence is at least 16.4%." 413 Mich., at 115; Appendix, 25a.

Appellants Kleiner, Board, Brouillette and Lurvey, the Democratic Party members of the apportionment commission, promptly and timely filed for rehearing, claiming Fourteenth Amendment/*Reynolds* v. *Sims* violations in the Court's plan. They asserted then and in subsequent argument that (1) *Mahan* v. *Howell* did not enunciate a mechanistic rule of 16.4% allowable population divergence; (2) the Michigan Court had overlooked the subsequent decisions of *Chapman* v. *Meier*, 420 U.S. (1975), and *Connor* v. *Finch*, 431 U.S. 407 (1977), which held that *court*-ordered legislative apportionment plans, as distinguished from *legislatively*-adopted apportionment plans, are subject to a stricter standard than that permitted in *Mahan*, namely, an under-10% *de minimis* standard; (3) the Michigan Court could not disregard other factors of population inequality, such as the mean deviation from norm of all districts; and (4) *in toto*, the Michigan Court had improperly substituted the following of political boundaries for population equality, as nearly

as practicable, as the primary goal of legislative apportionment. The present federal questions were thus timely raised on the application for rehearing, and at the first opportunity to do so.

On May 21, 1982, the Court (without opinion) denied the application for rehearing and directed adoption of its master's plan. Justice Moody dissented. Justices Levin and Fitzgerald filed a separate concurring opinion in support of the denial of rehearing.

According to the justices' own analyses of the resulting districts, an ideal Senate district has 243,739 persons; the difference between the largest and smallest districts is 39,626 persons, or 16.24%. An ideal House district has 84,201 persons; the difference between the largest and smallest House districts is 13,774 persons, or 16.34%. The average Senate and House districts deviate more than 5% from the respective norms. A minority of the state's population can elect a majority of the seats in each house (taking into account in the Senate the Lieutenant Governor's tie-breaker vote).

From these orders Commissioners Kleiner, Board, Brouillette and Lurvey claim appeal, for infringement of their Fourteenth Amendment rights.[1]

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

This case presents the unprecedented claims by a court[2] that deliberately-created, widespread and substantial deviations from equal population in a court-ordered legislative apportionment plan are legally insignificant if the maximum deviation

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[1]Appellants unsuccessfully applied for an emergency stay to the Michigan Supreme Court and in turn to Justice O'Connor.

[2]These claims were not asserted by appellees prior to the Court's decision below.

between the largest and smallest districts is 16.4%; that, notwithstanding the Supremacy Clause, the Equal Protection Clause is less demanding of state than federal courts in the context of legislative apportionment; that factors of population inequality other than the disparity between the two most extreme districts can be disregarded; and that adherence to political subdivision boundaries can be given primacy over a good faith effort to achieve equality of population among districts, as nearly as practicable.

1.

This appears to be the first case in which any court, state or federal, has taken the *de*scription of the 16.4% deviation in *Mahan* v. *Howell* to be a *pre*scription for constitutional redistricting. Although the Michigan Supreme Court conceded that, "'[T]he fact that a 10% or 15% variation from the norm is approved in one state has little bearing on the validity of a similar variation in another state.' *Swann* v. *Adams*, 385 U.S. 440, 445," 413 Mich. at 129, n. 17; Appendix, 55a, it took *Mahan* as establishing a *per se* rule. Moreover, instead of following the applicable standard of a good faith effort to "construct districts, in both houses of its legislature, as nearly of equal population as is practicable," *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); *Mahan* v. *Howell*, 410 U.S. 315, 324, the Michigan Court directed that political boundary lines be followed *unless* that breached the 16.4% standard; in short, equality of population was to be avoided except insofar as deemed constitutionally necessary.

The purported justification of the Michigan Court, that its action was pursuant to a "rational state" policy, is clearly without basis since the very predicate for the Court's entering a remedial order was its own declaration that there were *no* surviving state constitutional provisions pertaining to legislative apportionment (except only the requirements for single-member, contiguous districts).[3] Moreover, in alternatively au-

[3]See particularly note 24, 413 Mich., at 139; Appendix, 78a.

thorizing the Michigan *legislature* to prepare a plan (if it did so within a month), the Court imposed no similar county or other political boundary line requirements on the legislature. 413 Mich., at 142-143; Appendix, 85a-86a. And in relying on purported Michigan "constitutional history," the Court improperly relied on those very precedents which are no longer viable under *Reynolds* standards, especially since the Michigan Court relied in part on the apportionment provisions of the 1963 Michigan Constitution which were invalidated by this Court in *Marshall* v. *Hare*, 378 U.S. 561 (1964), and whose dedication to inequality the Michigan Court itself conceded in this case.[4]

2.

Secondly, the rulings of the Michigan Supreme Court plainly violate this Court's later holdings in *Chapman* v. *Meier*, 420 U.S. 1 (1975) and *Connor* v. *Finch*, 431 U.S. 407 (1977), pertaining to *court*-ordered apportionment plans — both of which cases the Michigan Court obviously overlooked in what was purported to be a comprehensive survey of post-*Mahan* v. *Howell* decisions. Opinion, n. 17, 413 Mich., at 128; Appendix, 53a. In *Chapman* and *Connor*, this Court stated that deviations from population equality of the magnitude involved in *Mahan* v. *Howell* "simply cannot be tolerated in a court-ordered plan, in the absence of

[4] "Nothing, however, could be clearer than that Art 4, §§2-6 provides that senatorial and house districts were not to be equal in population. Land area as well as population was to be taken into consideration. Election district lines were to be drawn along county lines without regard to whether districts more equal in population might be achieved by a different methodology. Considerations of equality and the preservation of other constitutional rights, recognized and articulated in art 1, §2 of the 1963 Constitution, were subordinated to the criteria set forth in Art 4, §§2-6, insofar as apportionment of the Legislature is concerned.

"The touchstone of Art 4, §§2-6 was discrimination; discrimination in favor of less populated areas against the more populated areas. The Legislature was to be apportioned according to the criteria stated in Art 4, §§2-6 without regard to the goals of achieving equality and the avoidance of discrimination." 413 Mich., at 124; Appendix, 44a-45a.

Ironically, what the Michigan Court does, by effect of its 16.4% standard, is to alter the weight of the land area formula which this Court invalidated in *Marshall* v. *Hare*, from a ".7%=1%" rule to a ".918% (±8.2%) = 1% rule.

some compelling justification . . . '[A] court-ordered reapportionment plan of a state legislature . . .' must ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Connor*, citing *Chapman*, 431 U.S. 417. Moreover, as to the presently posited justification of adherence to political boundary lines, that was the very rationale which was rejected in *Chapman* and *Connor*: "Recognition that a State may properly seek to protect the integrity of political subdivisions or historical boundary lines permits no more than 'minor deviations' from the basic requirement that legislative districts must be 'as nearly of equal population as is practicable.' . . . In *Chapman* v. *Meier*, . . . it was established that the latitude in court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and that the burden of articulating special reasons for following such a policy in the face of substantial population inequalities is correspondingly higher." *Connor*, 431 U.S. 419-420. In *Connor*, the Court characterized population deviations of 16.5% in the Senate districts and 19.3% in the House districts as "hardly . . . *de minimis;* they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments." 431 U.S. 418.

Two members of the Michigan Court in their concurring opinion to the May 21 order sought to distinguish *Chapman* v. *Meier* and *Connor* v. *Finch* on the ground that those cases involved federal not state courts. *Inter alia*, they cited textual allusions to "federal courts." But although those cases arose in the federal court system, that distinction was not the basis for decision by this Court. Not only do the opinions make frequent unqualified references to "court-ordered plans,"[5] but they

[5]For example, in *Chapman* v. *Meier*, it was said:

"We believe that a population deviation of that magnitude in a court-ordered plan is constitutionally impermissible [unless] . . ." 420 U.S., at 24.

"A court-ordered plan, however, must be held to higher standards than a

distinguish between the greater latitude accorded to *legislatively-adopted* than to *court-ordered* plans, bespeaking deference to the proposition that, "'[L]egislative reapportionment is primarily a matter for legislative consideration and determination,' *Reynolds* v. *Sims*, 377 US, at 586, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor* v. *Finch*, 431 U.S., at 414-415.

Since the Michigan Supreme Court was avowedly acting in the exercise of *judicial* not legislative or administrative power — indeed, it was expressly eschewing the limited role of resolving apportionment commission deadlocks which Mich Const, art 4, §6, ¶[7] had thrust upon it — its remedial actions to correct legislative malapportionment cannot, under the Equal Protection Clause and the Supremacy Clause, be any less demanding than similar action by a federal court; otherwise, races to the state and federal courthouses would result, with a different Fourteenth Amendment applied in each.[6]

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State's own plan." 420 U.S., at 26.

"We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation." 420 U.S., at 26-27."

Similarly, in *Connor* v. *Finch*, it was said:

"In *Chapman* v. *Meier*, however, it was established that the latitude in court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures . . ." 431 U.S. at 419.

[6]The concurring opinion of the two justices also sought to analogize the Michigan Supreme Court's role to that of any other state apportioning agency, seizing upon the reference in *Chapman* to plans formulated by state legislatures "or other State bodies." 420 U.S., at 26. But in context the latter reference is to administrative agencies and the like which are charged under state law with redistricting responsibilities, not to courts like the Michigan Supreme Court which exercise a judicial and remedial role, albeit concedly with the effect of law, *in the event of default of their responsibilities by the duly constituted state redistricting authorities*. See, *Wise* v. *Lipscomb*, 437 U.S. 535, 538 (1978) (concurring opinion by Powell, J., emphasizing *legislative* role of city council).

As this Court said in *Maryland Committee* v. *Tawes*, 377 U.S. 656, 674 (1964):

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes. However, in determining the validity of a State's apportionment plan, *the same federal constitutional standards are as applicable whether the matter is litigated in a federal or a state court.*"[7]

3.

A third important question presented is whether a court can disregard all other factors of population inequality other than the disparity between the two polar districts, particularly average deviation from the norm. As pointed out in the dissenting opinion of Justice Moody and even in the concurring opinion of Justices Levin and Fitzgerald, the Court's order that political unit lines be rigidly adhered to until the 16.4% outer limit was reached had the effect of clustering districts at both ends of the population extremes. The average deviation from norm exceeded 5% in both houses, and most districts fell at one pole or the other. Justices Levin and Fitzgerald alone sought to justify such phenomena by asserting that this Court had, in assessing compliance with population equality requirements, disregarded all evidence of population inequality other than largest-to-smallest district comparisons. But that assertion is simply incorrect.[8] And surely the basic *Reynolds* require-

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[7]The Michigan Supreme Court's remedial order cannot be transmuted into a mere interpretation of state law, for as the entire Court held on March 25 in rejecting the continued viability of the Apportionment Commission and its procedures, there no longer was any state law to apply. And indeed, the legislature and Governor were given an entirely independent option to promulgate a legislative apportionment plan without regard to the purported preservation of political unit boundaries. 413 Mich., at 142-143, 144-145; Appendix, 85a-86a.

[8]For example, in *Connor* v. *Finch*, immediately preceding the statement that, "Such substantial deviations from population equality simply cannot be tolerated in a court-ordered plan, in the absence of some compelling

ment of a good faith effort to achieve equality of district populations as nearly as practicable cannot be met when, by plan design, virtually no districts approach the ideal and virtually all are clustered at the avowed outer "range of allowable [population] divergence."

4.

For the reasons stated above, the Court below improperly accorded primacy to the standard of adherence to political unit boundaries, rather than to making "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U.S. 533, 577.

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The present rulings have made an absurdity of the flexibility authorized in *Mahan* v. *Howell* and perhaps about to be acknowledged in the pending congressional redistricting case of *Karcher* v. *Daggett*, No. 81-2057, probable jurisdiction noted, ___ U.S. ___, 50 LW 3998.01 (June 21, 1982). But flexibility is one thing; a *reductio ad absurdum*, as here, is quite another.

This appeal presents issues which are important to all states and to the future of *Reynolds* v. *Sims* principles generally.

Unless probable jurisdiction is noted and the lower court's decision is reversed, the prior rulings of this Court and the principles of *Reynolds* and its progeny will be seriously undermined, and the voting rights of appellants and others will be denied.

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justification," 431 U.S., at 417, the Court identified not only the population extremes, but that, "Fourteen of the court's 52 Senate districts have variances from population equality of over 5%, plus or minus, and four of these have variances of 8% or more, plus or minus. . . . Forty-eight [House] districts vary more than 5% either way, and 11 of those districts vary more than 8% either way." 431 U.S., at 417.

The Court also cited as significant that an alternative plan had been tendered to but rejected by the District Court, among whose features was "that the number of districts deviating by more than 5% from the population norm, plus or minus, would have been reduced from 15 to 9." 431 U.S., at 420.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

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